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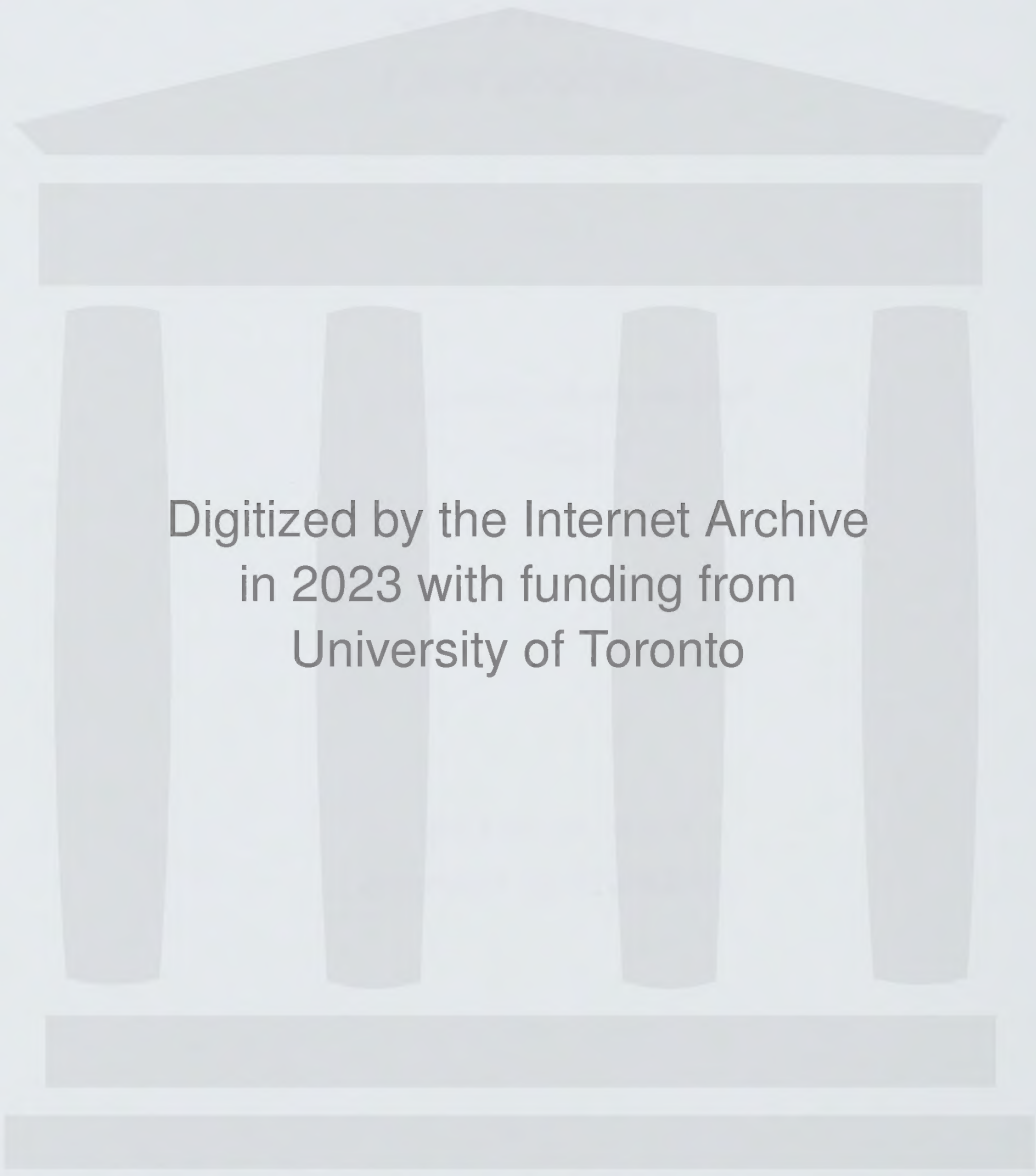
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CHAPTER ONE:

POSSESSION AND TITLE AT COMMON LAW

(This chapter taken, with some alterations, from Jim Phillips, *Property Law: 2008-2009*)

A) INTRODUCTION: WHAT IS POSSESSION?

The famous Canadian political theorist, C.B. Macpherson, observed that "[a]s soon as any society ... makes a distinction between property and mere physical possession it has in effect defined property as a right". This fundamental observation does not mean, of course, that possession is not a crucial concept in the common law of property. In fact, possession can be the origin of the property right. It is partly so in the law of transferof title in personal property law, for example. Title is transferred if there is a sufficient combination of intention to do so and "delivery," and delivery, where appropriate, is a transfer of physical possession.

More importantly, and this is what this chapter is about, in a number of contexts possession can lead to the acquisition of title/right without a transfer from another. At common law objects not previously owned (wild animals, minerals for example) become the property of those who first possess them. This is what the first and second cases below, *Pierson v. Post* and *Clift v. Kane*, are about. In addition, objects owned but "lost" can become the property of those who find and possess them. This is the context for the second case, *The Tubantia*,and for the section on "finders."

Further, the law of adverse possession, which is detailed in the second half of this chapter, not only permits someone to acquire title to land, but to do so in a way that is "adverse" to the rights of another, the owner. Put more simply, one person can take land away from another.

Underlying the issue of what amounts to sufficient possession are, of course, some deeper questions. When a court holds that certain acts amount to sufficient possession in fact to award title in law, it does so for a reason (or reasons). Look for those underlying reasons in the judgments. They show us values which inform, indeed at times produce, the rules.

B) FINDERS: GENERAL PRINCIPLES

The law relating to finders of "lost" objects demonstrates both the importance of possession and the relative nature of title to chattels. The cases here show that the finder of an object can claim title to that object. This principle is often supported by reference to a classic English case, *Armory v. Delamirie* (1722) 93 E.R. 664, in which a chimney sweep found a jewel and carried it to a goldsmith to have it valued. The goldsmith kept the precious stones, and the chimney sweep sued successfully for their return. The court promulgated the following rule: "That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the owner."

Note that the last phrase tells us that the chimney sweep had "a" title, not "the "title. His title was not as good as the original owner's, because the latter was a prior title. The common law has a hierarchy of title according to chronology.

The statement from Armory is not quite correct, in two senses. First, although the owner's title usually survives a loss and a finding by another, it does not do so if the owner is considered to have abandoned his or her interest in the property. Abandonment is hard to establish and thus rare. It requires an intention to give up title, and mere loss does not convey such an intention. In *Simpson v. Gowers*, (1981), 121 D.L.R. (3d) 709 (Ont. C.A.) the Ontario Court of Appeal said: "Abandonment occurs when there is a giving up, a total desertion, and absolute relinquishment of private goods by the former owner." Abandonment can be inferred from the circumstances, with the best examples being sporting ones - baseballs being hit into the crowd during major league games are abandoned, as are golf balls hit into the water or trees (or the many other places I have lost golf balls).

Second, and conversely to the point about abandonment, the true owner may not be the only person with another claim to the property claimed by the finder. A prior finder might have such a claim, and prior title is better. Or the person on whose land the property was found may have a prior claim also, an issue discussed below.

These two additions to the Armory statement mean that the rule is the one stated by Ziff, *Principles of Property Law*, fourth edition, p. 134: "a finder acquires title good against the world, except for those with a continuing antecedent claim". That is, the finder's claim must be antecedent to other claims (true owner, prior finder, occupier) which must also be continuing claims (not abandoned).

(C) FINDERS AND OCCUPIERS

To this point we have considered only the position of the finder in relation to the true owner and to other finders. But the cases show an additional complication - that in some circumstances, where the object is found on private property, the occupier (not the owner, although that is often the same person) of the land on which the chattel was found has a better claim than a finder. For some time, in both Britain and Canada, the cases were divided on whether the occupier had rights against the finder, and if so in what circumstances. The *Parker* case is now considered the leading authority on the question. In addition to sorting out what the rules on this are, think about the rationales offered for them.

(D) FINDERS AND ILLEGALITY

In *Parker* Donaldson L.J. states both that a trespassing finder always loses to the occupier, and that a "dishonest taker" has only a "frail" title. Both these assertions raise the issue of what effect an illegal act should have on property law's rules for the allocation of title. Should the law simply apply the rule that possession of the right kind makes a person a finder and therefore gives him or her a finder's title? Or should property law give way to other considerations.

The leading case on both trespassers and "dishonest takers" from the Ontario courts is still *Bird v. Fort Frances*, [1949] 2 D.L.R. 791 (Ont. H.C.), although many people think the reasoning in *Parker* should now prevail. In *Bird* a 12-year-old boy was crawling around in the basement of a pool-hall when he found a can with a large number of banknotes in it - c. $1,500. His "generous spending" alerted his mother to the windfall, and she gave it to the police. The owner was not traced, and the occupier of the pool hall did not make a claim. The issue was thus whether the money belonged to the boy or to the town. McRuer C.J.H.C. found for the boy. His judgment is long and confusing, but it did include an extensive canvassing of many older authorities, including:

"The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights ... Even a wrongful possessor of a chattel may have full damages for its conversion by a stranger to the title, or a return of the specific thing." Oliver Wendell Holmes

"The possessor need not have the further qualification of a title to possess. The facts of exclusive and exclusory control may be as true of a finder, borrower, pawnbroker, an honest non-owner who believes he is the owner, a trespasser, or even a thief, as they are of a true owner." Goodeve on Personal Property, 8th ed., pp. 38-9

"If a finder has reason to believe that the thing is abandoned by its owner, then, whether or not it is so abandoned and whether or not a civil trespass is committed, there can be no theft at the first because there does not exist the belief that the appropriation will be invito domino which is essential for animus furandi. And a subsequent appropriation, even after discovery that the owner had no intention of abandonment, would seem to be within the principle of the immunity accorded by the modern decision to the pure finder. A taker upon a loss and finding may, like any other possessor, maintain trespass and theft ... against a stranger." Pollock & Wright on Possession, 1888, p. 187

McRuer C. J. also stated that Bird was not a "true finder," that is, "the money was not found in a public highway or public conveyance or in any place to which the public had access by leave or licence.... It was not lost in the sense that a wallet is lost if dropped in

the street." Thus: "The plaintiff had no right to remove it from the property of another, and undoubtedly was a wrongful taker." But, he continued, "it is not necessary for me to decide whether the taking was with felonious intent or not." This was because whether Bird was a "mere wrongful taker" (trespasser) , or whether he had "felonious intent," - "in this case the same result flows." That is: "In my view the authorities with which I have dealt justify the conclusion that where A enters upon the land of B and takes possession of and removes chattels to which B asserts no legal rights, and A is wrongfully dispossessed of those chattels, he may bring an action to recover the same."

Bird certainly says that the trespass makes no difference as such, although note the qualification in the above statement in the words "to which B asserts no legal rights." He is probably referring to any claim B might make as the occupier. The quotation in context also seems to suggest that an intent to steal, or a theft, makes no difference either.

The question of what kinds of illegality, if any, vitiate finders' title probably remains unresolved as a matter of common law, although criminal statutes, including the *Canadian Criminal Code*, resolve the problem in some cases by requiring the confiscation of the proceeds of certain crimes when the possessor has been convicted.

A more general, common law, principle was enunciated in *Baird v. Queen in Right of British Columbia* (1992), 77 C.C.C. (3d) 365 (B.C.C.A.), where the court had no such statute to rely on because there was no conviction. A search of Baird's hotel room revealed some $16,000 in cash and travellers' cheques which were identified as part of the proceeds of a robbery, and which Baird admitted were so. For reasons that do not concern us Baird was not prosecuted, and nor did the robbery victim want the money back. Baird thus applied for the return of the money from the crown. His lawyer relied on *Bird*, and argued that Baird "is entitled to retain possession against anyone, save the person from whom he may have wrongfully trespassed in acquiring them and save any person who can prove a superior title". The court distinguished *Bird* "as a kind of finders keepers case where there was not that degree of criminality or culpable immorality necessary to support" a claim that illegality should be a bar to recovery. It said that despite the lack of a conviction, "the conduct of Mr Baird giving rise to his claim is so tainted with criminality or culpable immorality that as a matter of public policy the court should not assist him to recover".

Did the court find a valid ground for distinguishing *Bird* from *Baird*? Is not a case like Armory also one in which the finder knew the property was not his? In *Baird* the crown had the money in its possession, and made a claim for bona vacantia - literally "vacant goods", and a doctrine that holds that unclaimed property belongs ultimately to the crown. What if Baird had somehow got possession of the money again, and the court would thus not have been asked to "assist him to recover"? What if a third party, not the true owner, and not the original "finder", had had possession?

The English Court of Appeal appears to have taken the opposite approach to the *Baird* court in *Webb v. Chief Constable of Merseyside Police*, [2000] Q.B. 427 (C.A.), and in doing so to have cast doubt on aspects of *Parker*. Webb had been in possession of money

that the police believed was the proceeds of drug trafficking, but he was not convicted. Conviction would have triggered confiscation of the money, but in its absence the police claimed that they could keep it if they could establish, on the civil standard, that it was the proceeds of crime. The court disagreed, holding that a conviction was required and that "[t]he illegality of the means of acquisition of the money gave rise to no public policy defence to the claimants' claim". It continued: "if goods are in the possession of a person, on the face of it he has the right to that possession. His right to possession may be suspended or temporarily divested if the goods are seized by the police under lawful authority. If the police right to retain the goods comes to an end, the right to possession of the person from whom they were seized revives. In the absence of any evidence that anybody else is the true owner, once the police right of retention comes to an end, the person from whom they were compulsorily taken is entitled to possession".

A distinction between *Baird* and *Webb* is that in the latter case the claimant did not admit to having acquired the property illegally. But *Webb* seems to enunciate a broader principle, and was read that way in *Costelo v. Chief Constable of Derbyshire Constabulary*, [2001] 1 W.L.R. 1437 (C.A.). Costelo was found in a stolen car, and it was established that he knew it was stolen. However, another man, also in the car at the time, was convicted of the theft, and the true owner was never traced. The court applied Webb, concluding that it stood for the proposition that at common law "possession means the same thing and is entitled to the same legal protection, whether or not it has been obtained lawfully or by theft or by other unlawful means".

A recent case which clearly involved a "tinge" of illegality is *Thomas v. Attorney-General of Canada* (2006), 64 Alta. L.R. (4th) 184 (Q.B.). Burton Thomas of Edmonton went one day to his rented Post Office box and discovered in it a Canada Post Express envelope containing $18,000 in cash in 18 separate envelopes. He had opened it without looking at the addressee, and when he then did so he found that it was addressed to another Post Office box. He took the money to the police. To cut a long story short, the named recipient denied any knowledge of where the money had come from or why it had been sent to him, and the sender could not be located. Canada Post made no claim.

The attorney-general argued that the government should keep the money, but the court rejected that. While the money may well have been the proceeds of crime, Thomas had committed no offence. And "even if [his] actions [in opening the envelope] could be viewed as wrong ... this should not disentitle him." Trussler J. acknowledged that "the case law is not clear about the effect of acquiring possession of an item by a wrongdoing," he was "inclined to follow" *Bird*. He cited *Baird*, but for the proposition that any wrongdoing in the current case "was inadvertent and not tainted by a high level of criminality." The crown's final argument was that public policy should operate to deny Thomas, in that "members of the public should be prevented from making claims on other peoples' mail and it is important to encourage due care of recipients when opening the mail." Trussler J. accepted that these were valid concerns, but they were "not pressing and substantial enough to disentitle Thomas."

(E) ADVERSE POSSESSION OF LAND: INTRODUCTION

As we will see in a subsequent chapter, the common law maintains the fiction that the ultimate ownership of all real property lies in the Crown, and no individual can "own" land. Instead, individuals have "title" to land. Nowadays title is invariably asserted through a document - a conveyance or a will. But historicallypossession was a very significant part of the law of title. First, in and of itself it provided a method of acquiring title to unoccupied lands. At common law factual possession, including possession which has no obvious rightful origin, gave a title to the possessor. Second, possession also provided a method of proving title against other claimants, of reinforcing title. In the medieval period possession was called seisin, and seisin was "fact not right". It "expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership": Gray, *Elements of Land Law*, p. 53. Possession, it is often said, was the root oftitle.

This initial description of title at common law would not be complete without also noting an important corollary of it - that title to land at common law is relative, just as we saw that it is with personal property, in the finders section. Title to land also cannot be absolute because the Crown owns all land, and therefore it was, and is, pointless to ask a court to decide who owns the land. Instead, one asks the court - of the two disputants before you, who has the better title? This can be illustrated by a simple example:

A owned land and sold it to B, who never occupied it; C occupied the land as vacant land; C was then forcibly dispossessed by D.

B, C, and D all have a title, but some titles are better than others. B's is best because it is first. But C also has a title by possession, could sue D for recovery of the land, and if C did so the court would not inquire into whether there was somebody out there with a better title than C. B must take an action on his or her own account. C may have had no "right" to occupythe land, but "a wrongful possessor will be able to defend his possession against trespassers and adverse claimants who have no better right": McNeil, *Common Law Aboriginal Title*, p. 15.

While it fulfills nothing like as important a role as it once did, possession remains important in the common law of title to real property. Conceptually in registry systems "modern conveyancing rests to some degree on the assumption that proof of continued de facto enjoyment of land by the vendor and his predecessors provides a good root of title for the purchaser": Gray, *Elements of Land Law*, p. 59. More importantly for current purposes, it remains possible to acquire title to land at common law, good against all the world, through long possession. But it can also be done through the law ofadverse possession.

Briefly, since the requirements for adverse possession are what the rest of this chapter is about, adverse possession means that uninterrupted enjoyment of land of the correct nature over a period of time stipulated by law by a squatter (non-owner) deprives the

owner of his or her title and effectively gives to the squatter a title to the land, a title better than all others.

There are therefore two principal aspects of adverse possession law. The first is that of time. All jurisdictions in which it is possible to obtain title by adverse possession provide a statutory period during which a person claiming a title to land must act to recover the land from a wrongful possessor. That is why the rules relating to adverse possession are in the Real Property Limitations Act, which came into force in 2004. (It replaced Part 1 of the old Limitations Act, which is the statute referred to in the cases, but did not alter any of the provisions.) A claim of title by adverse possession is thus a defence to an action by someone with "paper title." Not all jurisdictions have the same time period. The following provisions tell you, inter alia, what the time period is in Ontario, and what "starts the clock running":

4) No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

5) (1) Where the person claiming such land or rent, or some person through whom that person claims, has, in respect of the estate or interest claimed, been in possession or in receipt of the profits of the land, or in receipt of the rent, and has, while entitled thereto, been dispossessed, or has discontinued such possession or receipt, the right to make an entry or distress or bring an action to recover the land or rent shall be deemed to have first accrued at the time of the dispossession or discontinuance of possession or at the last time at which any such profits or rent were so received.

5) (9) Where the person claiming such land or rent, or the person through whom that person claims, has become entitled by reason of any forfeiture or breach of condition, such right shall be deemed to have first accrued when the forfeiture was incurred or the condition broken.

13) Where any acknowledgement in writing of the title of the person entitled to any land or rent has been given to him or to his agent, signed by the person in possession or in receipt of the profits of the land, or in the receipt of the rent, such possession or receipt of or by the person by whom the acknowledgment was given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent the acknowledgment was given at the time of giving it, and the right of the last-mentioned person, or of any person claiming through him, to make an entry or distress or bring an action to recover the land or rent, shall be deemed to have first accrued at and not before the time at which the acknowledgment, or the last of the acknowledgments, if more than one, was given.

15) At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action the right and title of such person to the land or rent, for the recovery whereof such entry distress or action, respectively, might have been made or brought within such period, is extinguished.

16) Nothing in sections 1 to 15 applies to any waste or vacant land of the Crown whether surveyed or not, nor to lands included in any road allowance heretofore or hereafter surveyed and laid out or to any lands reserved or set apart or laid out as a public highway where the freehold in any such road allowance or highway is vested in the Crown or in a municipal corporation, commission or other public body, but nothing in this section shall be deemed to affect or prejudice any right, title or interest acquired by any person before the 13th day of June, 1922.

36) If at the time at which the right of a person to make an entry or distress, or to bring an action to recover any land or rent, first accrues, as herein mentioned, such person is under the disability of minority, mental deficiency, mental incompetency or unsoundness of mind, such person, or the person claiming through him or her, even if the period of ten years or five years, as the case may be, hereinbefore limited has expired, may make an entry or distress, or bring an action, to recover the land or rent at any time within five years next after the time at which the person to whom the right first accrued ceased to be under any such disability, or died, whichever of those two events first happened.

Note that while possession by the adverse possessor must be continuous for the period of time, this does not mean that the same person must possess the land for all of that time. Provided there is no gap in possession, the rights acquired by the potential adverse possessor, the "inchoate possessory title," can pass from one person to another so that at the expiry of the limitation period "the last successor being then in possession will acquire a title in fee simple good against all the world including the true owner": per Bowen C.J. in *Mulcahy v. Curramore Ply. Ltd.* [1974] 2 N.S.W.L.R. 464 (C.A.). See also McRuer C.J.H.C. in *Fleet v. Silverstein* (1963), 36 D.L.R. (2d) 305 (Ont. H.C.): "[T]here is abundance of authority that is binding on me that where there has been adverse possession by 'A' as against 'B' which is surrendered to 'C' and 'C' immediately enters into possession of a right which has been handed over to him by 'A' the Statute of Limitations continues to run against the true owner".

The converse to this is also well established: that is, that if a squatter abandons the land before the expiry of the limitation period the title holder "regains" full rights. He or she does not have to bring an action for recovery (there being no one in possession against whom to bring such action), nor will a later adverse possessor get the advantage of the previous possession unless his or her entry was substantially continuous with the previous squatter's departure: see *The Trustees, Executors and Agency Co. Ltd. v. Short* (1888), 13 App. Cas. 793 (P.C. - N.S.W.).

You might think about how these points help to illustrate the introductory comments above about possession being the root of title and about the relativity of title. The "trespasser" who has not stayed the correct amount of time has still acquired something,

even if it is not a title that can be passed on other than by the successor immediately possessing the land.

The existence, and indeed the value, of an "inchoate possessory title" is illustrated by *Perry v. Clissold*, [1907] A.C. 73 (P.C - N.S.W.). Under New South Wales expropriation legislation the government issued a notice of expropriation to one Frederick Clissold in 1891. Nothing further was actually done with the land, although the legislation provided that publication of the notice was sufficient to convey all rights in the land to the government, and Clissold died in 1892. In 1902 Clissold's heirs demanded compensation, but the Minister refused when it turned out that Clissold had entered the land in 1881. Although he fenced it and treated it as his own, and likely had sufficient "quality of possession" to obtain full title, he clearly did not have sufficient "quantity of possession" under the applicable statute. The case went to the Privy Council on the narrow question of whether a prima facie case for compensation was disclosed on the facts, and the court held that it was. "It cannot be disputed", Lord MacNaghten said, "that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner". The expropriation legislation provided for compensation "to every person deprived of the land" and "it could hardly have been intended ... that the Act should have the effect of shaking titles which ... would in process of time have become absolute ... or that ... Ministers ... should take advantage of the infirmity of anybody's title in order to acquire his land for nothing".

The following extract canvasses and critiques the arguments usually made for why we have adverse possession.

F) ADVERSE POSSESSION: THE "QUALITY" OF POSSESSION

The next three sections explore what "quality" of possession is needed to establish an adverse possession claim. Generally, to make out the defense of adverse possession the squatter must show not only that he or she has been in continuous possession of the land for the requisite period of time, but also that the possession had been "actual possession" in the manner of an ordinary owner. "Actual possession," the first part of the test in the first case, *Re St Clair Beach*, is usually broken down into a number of discrete but related elements: actual, continuous, exclusive, peaceful, adverse (without permission of the other or acknowledgment of the owner's title, and open or notorious). The word actual appears twice here - as the general requirement and as one of the specific elements of that requirement. When used in the latter instance it means "acts of possession" - did the trespasser do the kinds of acts on the land that an ordinary owner would do. It is like factum in personal property, and like factum is contextual.

Although the court does not come to a conclusion on the matter, it is likely that, if the title holder had gone out of possession, the MacDonalds would have been held to have sufficient "acts of possession." What arguments would you make that the MacDonalds did physically possess the land as an ordinary owner would do?

The court finds that the defence cannot succeed because the MacDonalds did not have exclusive possession. Why not? And what does this tell you about what the owner needs to do to remain in possession?

Even if the MacDonalds had been in possession in a physical sense, and even if the title holders had discontinued possession, the MacDonalds would probably still not have won. Why not? See s. 13 of the Act.

One final point of introduction is necessary here. It was stated above that adverse possession doctrine serves as a defence, specifically as a defence to an action by a title owner to recover land occupied by a squatter. However, in *Re St Clair Beach* the claim for possessory title is made affirmatively. In fact, there are many cases in which an affirmative claim is brought by a squatter, and even though there is very little direct authority on the point it is reasonable to say that there is no procedural difficulty in doing so. In any event, the affirmative claim is made in this case as a direct result of the operation of the land titles system. A few explanatory sentences on systems of recording title are therefore necessary here.

There are two such systems in common law Canada. Briefly, the registry system permits registration of all documents pertaining to land in the local registry office, but it does not require registration nor does it guarantee title. Prospective purchasers must therefore "search" the title by checking all the documents registered against a particular piece of land. By registering an owner protects title against all unregistered documents but not against unwritten unregistered claims such as title acquired by adverse possession. This system was historically in effect in the Maritime Provinces, southern Ontario (generally), and parts of Manitoba. It is being converted, with the aid of computerisation, into a Land Titles system in many places.

In the other system, known as Land Titles or the Torrens system, the government guarantees title as shown on the record. When title to a particular piece of land is first recorded all outstanding interests in it are investigated and a certificate of title is issued. An insurance fund provides compensation for official errors. There is no need to search title in a Land Titles system: one merely obtains the official certificate of title. Land Titles is used exclusively in British Columbia, Alberta and Saskatchewan, in parts of Manitoba and in northern Ontario.

Many areas of the country that at one time used only the registry system now have both systems, with owners having an option. And this is the context for *Re St Clair Beach*. As stated in the opening paragraph, St Clair Beach Estates Limited applied for "first registration" under the Land Titles Act. The MacDonalds objected, arguing that as a result of their long possession they, and not St Clair Beach Estates Limited, owned the disputed parcel.

(H) RETREAT FROM THE INCONSISTENT USE TEST

The biggest problem with the inconsistent use test is revealed by thinking about the discussion of intention in *Beaudoin*, a case decided before *Masidon Investments*. In *Beaudoin* the court held that the adverse possessor could not be required to intend to exclude the true owner specifically, since he mistakenly believed that he was the owner. It is similarly true that the possessor cannot effectively exclude the owner if the parties are mistaken about title, because the true owner cannot have a use for the land if he or she does not believe that he or she is the owner.